HIGH MARK (M) SDN. BHD. v. PACTO MALAYSIA SDN. BHD.

[A.C.J. (Zakaria Yatim J.) June 9, 1984]

[Kuala Lumpur – Suit No. C 740 of 1984]

Building contract – Building project – Turnkey contract – Employment of consultants – Drawings and designs – Termination of contract – Effect of.

Contract – Turnkey contract – Drawings and designs.

Practice and Procedure – Injunction – Application to set aside – Whether damages adequate remedy – Balance of convenience.

In this case the defendants applied to discharge and set aside an injunction order made by the court on March 21, 1984. The defendants had entered into a contract with the plaintiffs for the building of a five-storey office building and a factory in Shah Alam. Under the contract (contained in two letters dated September 6, 1983 and February 22, 1984), the plaintiff company was employed as a turnkey contractor. In pursuance of the said contract the plaintiffs employed three consultant firms: architects, engineers and mechanical and electrical engineers to do architectural drawings, structural drawings and mechanical and electrical drawings and designs, respectively. The drawings and designs were listed in the schedule attached to the order which restrained the defendants from using the drawings and designs. The plaintiffs claimed that those drawings and designs belonged to them as the turnkey contractor and they were part of the service contracts between the plaintiffs and the consultants. On March 1, 1984, the defendants by letter to the plaintiffs terminated the turnkey contract. According to the plaintiffs the defendants had made offers to the plaintiffs' consultants to terminate their respective contracts with the plaintiffs and then enter into separate arrangements with the defendants.

The defendants in support of their applications admitted terminating the services of the plaintiffs as a turnkey contractor. They maintained that the plaintiffs were acting as agents on their behalf in the matter of the engagement of consultants for the project and accordingly, the drawings prepared by the consultants belonged to them.

The plaintiffs argued that they would suffer damages which could not be measured and money damages would not be an adequate remedy if the defendants were allowed to induce those who were in the employ of the plaintiffs to break their contracts with them and they would lose credibility with other consultants.

Held: (1) the turnkey contract in this case was based on the pure turnkey principle. The drawings and designs were the legal responsibility of the plaintiffs as a turnkey contractor;

(2) there is nothing in the contract or agreements to suggest that the plaintiffs were the agents of the defendants. The plaintiffs were an independent turnkey contractor and in that capacity they engaged the services of the consultants;

(3) since the plaintiffs employed the three consultant firms in connection with the turnkey contract all the drawings and designs prepared by the consultants were the property of the plaintiffs;

(4) money damages would not be an adequate remedy. The plaintiff company, as contractor, would lose his credibility with other consultants. Even if it is doubtful as to whether damages would be an adequate remedy from the facts shown in the various affidavits the balance of convenience lies in favour of granting the injunction.

Cases referred to:

(1) *Retsal Drilling Co.* v. *Commissioner of Internal Revenue* 127 F. 2d. 355 @ 357.

(2) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150, 151.

APPLICATION TO SET ASIDE INJUNCTION.

Clarence Wilfred for the plaintiffs.
Varghese George for the defendants.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the defendants to discharge and set aside an injunction order made by me on March 21, 1984.

The injunction order was granted on an *ex parte* application made by the plaintiffs. The order stated that an injunction was granted restraining the defendants from using the drawings and designs, as listed in a schedule attached to the order, for the purpose of constructing a five-storey office block and a one-storey factory on Lot No. 2, Persiaran Selangor in Shah Alam. The order also restrained the defendants from offering, inviting or employing Wong T.C. Architects and Associates; Kumpulan Jurutera Perunding – Civil and Structural Engineers; and Zainuddin, Radzi dan Rakan-Rakan – Mechanical & Electrical Engineers, to build, construct, supervise or in any way to provide any services to the defendants in connection with the construction of the said buildings.

The facts relied upon by the plaintiffs in seeking for the injunction were found in the statement of claim (enclosure 1) and in the affidavit in support of the *ex parte* application (enclosure 2). By letters dated September 6, 1983 and February 22, 1984, the defendants entered into a turnkey contract with the plaintiffs for the building of the said five-storey office building and a factory in Shah Alam. Under the contract, the plaintiff company was employed as a turnkey contractor. According to the affidavit, the plaintiffs, in pursuance of the said contract, employed three consultant firms, namely, Wong T.C. Architects & Associates to do the architectural drawings; Kumpulan Jurutera

Perunding, Civil & Structural Engineers to do the civil and structural drawings; and Zainuddin Radzi dan Rakan-Rakan, Mechanical & Electrical Engineers to do the mechanical and electrical drawings and designs. The drawings and designs were listed in the schedule attached to the order. The plaintiffs claimed that those drawings and designs belonged to them as the turnkey contractor and they were part of the service contracts between the plaintiffs and the Consultants. On March 1, 1984, the defendants sent a letter to the plaintiffs terminating the turnkey contract. According to the plaintiffs the defendants had made offers to the plaintiffs' consultants to terminate their respective contracts with the plaintiffs and then enter into separate arrangements with the defendants.

The defendants, in their affidavit (enclosure 10) in support of the application to set aside the injunction, admitted terminating the services of the plaintiffs as a turnkey contractor. The same affidavit also stated that the plaintiffs were acting as agents on behalf of the defendants in the matter of the engagement of consultants for the project. Accordingly, the drawings prepared by the consultants belonged to the defendants. Mr. Varghese George, counsel for the defendants, submitted that there were no contracts between the plaintiffs and the three consultants. He said that the plaintiffs, in engaging the consultants, were acting as agents for the defendants. When the services of the plaintiffs were terminated there was nothing to stop the defendants from continuing relationship with the consultants because the defendants were the principal. Accordingly, Mr. George argued, the defendants, being the principal, had the property in the drawings and designs.

The principal question to be examined here is what is the nature of the contractual relationship between the plaintiffs and the defendants and between the plaintiffs and the consultants.

I shall first examine the contractual relationship between the plaintiffs and the defendants. According to the plaintiffs, the defendants concluded a turnkey contract with the plaintiff company appointing the latter as the turnkey contractor. The defendants did not dispute this fact, for, in their affidavit [enclosure 10, para 3 (a)] it was expressly stated that the defendants "had in principle agreed to engage the services of the plaintiffs as the contractor on a 'turnkey basis' " in respect of the project.

The question that arises here is what is a "turnkey contract?" In the United States, the Circuit Court of Appeals in *Retsal Drilling Co.* v. *Commissioner of Internal Revenue*[1] defined a turnkey job as a job wherein "the driller of an oil well undertakes to furnish everything and does all the work required to complete the well, place it on production, and turn it, over ready to 'turn the key' and start the oil running into the tanks." One eminent writer, recently described "turnkey" as –

> "... a contract where the essential design emanates from, or is supplied by, the Contractor and not the owner, so that the legal responsibility for the design, suitability and performance of the work after completion will be made to rest ... with the contractor ... 'Turnkey' is treated as merely signifying the design responsibility as the contractor's."

Duncan Wallace QC, *Contracts for Industrial Projects,* Paper presented at a Seminar on Building and Civil Engineering Claims held in Kuala Lumpur in February, 1984, p. 3.

The turnkey system, however, may be modified. The owner may engage consultants to do the foundation or sub-structure designs leaving only the superstructures the subject of the lump sum turnkey arrangements. This is known as a "mixed-turnkey" contracts. See Duncan Wallace QC, *Construction Contracts from the Point of View of the Owner* p. 6.

It is clear, therefore, that, in its pure form the turnkey contractor is responsible for the planning, construction and supervision of the work. The legal responsibility for the design and planning rests with the contractors. On completion of the work, the contractor hands over the completed job to the owner. Sometimes the owner engages consultants to do the foundation and sub-structure designs. The contractor is only responsible for the planning, construction and supervision of the rest of the construction work. In order to determine what is the nature of a particular turnkey job, it is necessary to look at the relevant contracts between the parties concerned.

In the instant case, the terms of the contract are found in two letters written by the defendants to the plaintiffs. These letters were attached to enclosure 2 as exhibit CW1. The first letter, dated September 6, 1983, stated as follows:

> "Re: Proposed Factory and Office Building On Lot 2 Persiarian Selangor, Shah Alam, Selangor (Turnkey).
>
> Following our discussion dated September 5, 1983 we are pleased to inform you that we have appointed your company to undertake the above-mentioned project based on the following conditions:

1. Highmark Management & Consultancy Services (M) Sdn. Bhd. to proceed with the full working drawings on the project and submit to the relevant authorities for approval immediately.

2. Highmark Management & Consultancy Services (M) Sdn. Bhd. to carry out the required soil tests.

3. Patco Malaysia Sendirian Berhad will appoint an independent Quantity Surveyor and Mechanical/Engineering Consultant to verify all working drawings and the total project costs.

4. Final tender price and other terms/condition offered by you will be subjected to further negotiations.

We hope with this appointment, Highmark Management & Consultancy Services (M) Sdn. Bhd. will be able to proceed with the relevant works without much difficulties for the success of this project."

The second letter, dated February 22, 1984 dealt with the price of the job to be carried out by the plaintiffs.

It is clear from the letter dated September 6, 1983, that the defendants appointed the plaintiffs as a turnkey contractor in connection with the construction of the five-storey office building and a factory in Shah Alam. The plaintiffs were to do all the drawings in connection with the project. They were also required to do all the required soil tests. The defendants would only appoint an independent quantity surveyor and mechanical/engineering consultant merely to verify the drawings and the total project costs. The letter did not say that the consultant to be appointed by the defendants would be responsible for the preparation of the drawings and designs.

In pursuance of the turnkey contract, the plaintiffs entered into separate consultancy agreements with three consultant firms to do the necessary drawings and designs. One of the consultancy agreements was concluded between the plaintiffs and Zainuddin Radzi dan Rakan-Rakan. See enclosure 8, exhibit ABS2. Paragraph 3.2 of the Schedule to this agreement stated,

"All documents and drawings prepared by the Consulting Engineer in connection with the Works are the property of the Client and no complete reuse of such documents and drawings by the Consulting Engineer shall be made without the approval of the Client."

In the agreement, the word "client" explicitly refers to the plaintiffs.

With regard to the other two consultant firms, Wong T.C. Architects & Associates and Kumpulan Jurutera Perunding, there is no evidence that written agreements had been concluded between them and the plaintiffs. Counsel for the plaintiffs, Mr. Wilfred, told the Court that the agreements were verbally made between the plaintiffs and the consultants. In their affidavit in support of the *ex-parte* application (enclosure 2) it was stated that in pursuance of the turnkey contract, the plaintiffs employed the three consultant firms. One of the letters which formed the turnkey contract stated that the plaintiffs were required "to proceed with the full working drawings on the project ..." The defendants did not dispute the fact that it was the responsibility of the plaintiffs to appoint consultants. In their affidavit [enclosure 10 paragraph 4(c)] it was clearly stated that "the plaintiff was to be responsible for engaging and appointing other relevant Consultants for the Project." Mr. Wong Tow Cheng of Wong T.C. Architects & Associates in his affidavit (enclosure 9, paragraph 4) said that it was the plaintiffs who informed his firm to do the consultant work but added that the plaintiffs directed them to take all instructions as to design from the defendant. He admitted, however that the fees were paid by the plaintiffs. Encik Zaman bin Mohd. Adam, a partner of Kumpulan Jurutera Perunding, in his affidavit (enclosure 7) stated that the plaintiffs advised his firm in respect of the project and requested them to prepare structural and civil works drawings. There is no evidence that the defendants had concluded separate agreements with the two consultant firms before the termination of the turnkey contract.

In my opinion, the two consultant firms, Wong T.C. Architects & Associates and Kumpulan Jurutera Perunding were employed by the plaintiffs in connection with the turnkey contract. The turnkey contract, in the instant case, was based on the pure turnkey principle. The drawings and designs prepared by the consultants were, therefore, the legal responsibility of the plaintiffs as a turnkey contractor. In the absence of any special agreement, the plans and designs prepared by the two consultant firms were the property of the plaintiffs who employed the consultants and paid their fees in connection with the said turnkey job. See *Emden & Gills*, Building Contracts and Practice, 7th Edn. p. 400; and *Hudson's* Building and Engineering Contracts, 9th Edn., p. 141.

I am unable to accept the defendants' contention that the drawings and designs belonged to them. According to Mr. George, the consultants were engaged by the plaintiffs on behalf of the defendants. There is nothing in the contract or agree-

ments to suggest that the plaintiffs were the agents of the defendants. The plaintiffs were, indeed, an independent turnkey contractor and in that capacity they engaged the services of the consultants. The drawings and designs were, therefore, the property of the plaintiffs.

Since the plaintiffs employed the three consultant firms in connection with the turnkey contract and all the drawings and designs prepared by the consultants were the property of the plaintiffs, the next question to consider is whether the plaintiffs were entitled to the injunction granted to them on March 21, 1984.

Mr. George relied on the provisions of the Specific Relief Act, 1950 and contended that damages were an adequate relief if at all the plaintiffs succeeded in the action. According to him, in view of the provisions of the Specific Relief Act, injunction should not be granted and the order made on March 21, 1984 should be discharged. In support of his argument he relied on a passage in the judgment of Abdoolcader J., as he then was, in *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.*[2] The passage reads:

"I think the basic principles in *American Cyanamid* can be aptly put thus: In order to be able to grant an interlocutory injunction, the Court does not have to be satisfied that if the case went to trial on no other evidence than is before the court on the hearing of the application for interlocutory relief, the plaintiff would be entitled to a permanent injunction in the same terms as that sought in the interlocutory proceedings. Where damages would be an adequate remedy, no interlocutory injunction should normally be granted, but if there is doubt as to the adequacy of damages, the question of the balance of convenience arises, and although it might not be improper to take into account, as one of the many varying factors relevant to this question, the relative strength of each party's case, this should be done only on the basis of facts disclosed by the affidavit evidence as to which there is no credible dispute, without embarking on anything resembling a trial of the action. When an interlocutory injunction is sought, the balance of convenience will be the overriding consideration."

Mr. Wilfred, on the other hand, argued that the damages suffered by the plaintiffs could not be measured and money damages would not be an adequate remedy. In their affidavit in support of the *ex parte* application (enclosure 2) the plaintiffs stated,

"My Company and I will also suffer irreparable harm and incalculable loss which cannot be compensated for any damages if the defendants are allowed to induce those who are in my employ to break their contracts with me and I will lose my credibility with other consultants."

In my opinion the passage quoted above is sufficient evidence to show that money damages would not be an adequate remedy. The plaintiff company, as contractor, would lose his credibility with other consultants. Even if it is doubtful as to whether damages would be an adequate remedy, in my view, from the facts shown in the various affidavits, the balance of convenience lies in favour of granting the injunction.

In the circumstances I dismiss the application to set aside the injunction with costs.

Application dismissed.

Solicitors: *Zulkifli & Co.; Zain & Co.*